A

Public Prosecutor v Mohamad Shafie bin Abdul Rani

B HIGH COURT (IPOH) — CRIMINAL APPEAL NOS AA-42JSKLB(A)-1–10 OF 2020, AA-42JSKLB(A)-2–10 OF 2020 AND AA-42JSKLB(A)-3–10 OF 2020
SU TIANG JOO JC
21 OCTOBER 2021

C

Criminal Procedure — Appeal — Withdrawal of appeal — Prosecution applied to withdraw notices of withdrawal of appeals — Whether the filing of notice to withdraw the appeal brought appeal to an end immediately — Whether court could exercise revisionary powers after notice of withdrawal of appeal filed — Whether appeal could be heard together with the court exercising its powers of revision

D

This was the application by the prosecution for the three notices of withdrawal of appeals to be withdrawn and to be struck off by the court. The respondent faced a total of seven charges under three separate cases in the Ipoh Sessions Court with offences against three children under s 14(a) to be read together with s 16 of the Sexual Offences against Children Act 2017 (Act 792) ('the Sexual Offences Against Children Act 792'). The three cases were jointly heard. After a trial and at the end of the prosecution's case, on 30 September 2020, the learned sessions court judge ('LSJ') held that the prosecution had failed to prove a prima facie case in all three cases and discharged and acquitted the respondent. Dissatisfied, by three separate notices of appeal, one for each of the three cases and all dated 6 October 2020, the prosecution appealed. The three appeals were to be heard on 30 June 2021 and the court had duly read the papers in preparation for the hearing of the appeals. On 29 June 2021, the prosecution filed a notice of withdrawal of appeal for each of the three appeals. Despite the notices of withdrawal of appeals, the court was of the preliminary opinion that further inquiry ought to be made into the three cases under appeal. Notice was given to the prosecution through the court's learned senior assistant registrar to re-look into the matter. On 23 July 2021, the learned deputy public prosecutor ('DPP') applied for the three notices of withdrawal of appeals to be withdrawn and to be struck off by the court. The learned counsel for the respondent objected to the withdrawal. The learned DPP submitted that based on her reconsideration of the matter, there were serious errors in both facts and law in the judgment of the learned sessions court judge and to her mind, appellate interference was warranted. It was the respondent's case that there was no provision in the Criminal Procedure Code ('the CPC') that empowered the court to decide on whether to allow the withdrawal of the notice of appeal and once filed, it could not be retracted as it prejudiced the

E F G H I

respondent The issues that arose for determination in the High Court were: (a) whether the filing of a notice of withdrawal of appeal brought an appeal to an end with immediate effect; (b) whether the court could exercise its revisionary powers under Chapter XXXI of the CPC when a notice of withdrawal of appeal had been filed; and (c) whether an appeal could be heard together with the court exercising its powers of revision.

Held, allowing the application:

(1) Once the notices of appeal were registered with the court, all proceedings came under the jurisdiction of the court and could only be brought to an end with the leave of the court. A notice of withdrawal of appeal would not bring an appeal to an end, until and unless the court allowed the appeal to be struck off or dismissed. If the High Court could exercise its powers of revision even if there was no appeal filed, surely it could do so if an appeal was filed, and a notice of withdrawal filed but before it was struck off by the court (see paras 35–36).

(2) Before allowing an appeal to be withdrawn by any party, it behooved the court to exercise its discretion judicially in order to ensure that the ends of justice were met. The perceived absolute discretion of the public prosecutor in art 145(3) of the Federal Constitution was not absolute. Once a case came within the purview of the court, the court would be armed with all the judicial powers to oversee the administration of justice. Having read the papers in the three appeals, the court was of the opinion that in the interest of justice, further enquiries ought to be made and that the prosecution ought to reconsider whether it ought to withdraw the appeals. With the prosecution having done so and having decided that there were merits to pursue the appeals both on the facts and in law, the matter would be heard but of course, in the presence of the respondent and his learned counsel. The court was conscious that justice is for all in the entire community including the children alleged to have been sexually assaulted and not only for the respondent (see paras 38 & 42–44).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pihak pendakwaan bagi tiga notis penarikan balik rayuan-rayuan untuk ditarik balik dan dibatalkan oleh mahkamah. Responden berhadapan dengan tujuh pertuduhan keseluruhannya di bawah tiga kes yang berasingan di Mahkamah Sesyen Ipoh dengan kesalahan-kesalahan terhadap tiga kanak-kanak di bawah s 14(a) yang dibaca bersama s 16 Akta Kesalahan Seksual terhadap Kanak-Kanak 2017 (Akta792) ('Akta Kesalahan Seksual terhadap Kanak-Kanak 792'). Ketiga-tiga kes didengar bersama-sama. Selepas perbicaraan dan di akhir kes pendakwaan, pada 30 September 2020, hakim mahkamah sesyen ('HMS') memutuskan bahawa pendakwaan telah gagal untuk membuktikan kes prima facie di dalam ketiga-tiga kes dan responden

dilepaskan dan dibebaskan. Tidak berpuas hati, pihak pendakwaan memfailkan tiga notis-notis rayuan untuk setiap satu kes dan kesemuanya bertarikh 6 Oktober 2020. Ketiga-tiga rayuan didengar pada 30 Jun 2021 dan mahkamah telah membaca kertas-kertas dalam persedian untuk pendengaran rayuan-rayuan. Pada 29 Jun 2021, pendakwaan telah memfailkan notis penarikan balik rayuan untuk ketiga-tiga rayuan. Walaupun telah terdapat notis-notis penarikan balik rayuan-rayuan, mahkamah berpendapatan awal bahawa soal siasat lanjut wajar dibuat untuk ketiga-tiga kes di bawah rayuan. Notis telah diberikan kepada pihak pendakwaan melalui penolong kanan pendaftar mahkamah yang terpelajar untuk mepertimbangkan semula perkara tersebut. Pada 23 Julai 2021, timbalan pendakwa raya ('TP') memohon untuk ketiga-tiga notis rayuan ditarik balik dan dibatalkan oleh mahkamah. Peguambela yang terpelajar bagi responden membantah penarikan balik tersebut. TP yang terpelajar menghujahkan bahawa berdasarkan pertimbangan semula beliau terhadap perkara tersebut, terdapat kesalahan-kesalahan serius di dalam fakta-fakta dan undang-undang di dalam penghakiman oleh hakim mahkamah sesyen yang terpelajar dan pada pemikirannya, campur tangan rayuan adalah perlu. Ia adalah kes responden bahawa tidak terdapat peruntukan di dalam Kanun Tatacara Jenayah ('KTJ') yang memberikan kuasa kepada mahkamah untuk memutuskan sama ada untuk membenarkan penarikan balik notis rayuan dan selepas difailkan, ia tidak boleh ditarik balik kerana ia memprejudiskan responden. Isu-isu yang berbangkit untuk diputuskan di Mahkamah Tinggi adalah: (a) sama ada pemfailan notis penarikan balik rayuan membuatkan rayuan tamat serta-merta; (b) sama ada mahkamah boleh menguatkuasakan kuasa penyemakan semula di bawah Bab XXXI KTJ apabila notis penarikan rayuan telah difailkan; dan (c) sama ada rayuan boleh didengar bersama dengan mahkamah dalam menjalankan kuasa penyemakan semulanya.

Keputusan, membenarkan permohonan:

(1) Sebaik sahaja notis rayuan telah didaftarkan di mahkamah, kesemua prosiding jatuh di bawah bidangkuasa mahkamah dan hanya boleh ditamatkan dengan kebenaran mahkamah. Notis penarikan rayuan tidak akan membuat rayuan ditamatkan, melainkan dan kecuali mahkamah membenarkan rayuan untuk dibatalkan atau ditolak. Jika Mahkamah Tinggi boleh menjalankan kuasa rujukan walaupun tiada rayuan difailkan, semestinya ia boleh berbuat sedemikian jika rayuan difailkan dan notis penarikan balik difailkan tetapi sebelum ia dibatalkan oleh mahkamah (lihat perenggan 35–36).

(2) Sebelum membenarkan rayuan untuk ditarik balik oleh mana-mana pihak, mahkamah boleh menjalankan budi bicaranya dari segi undang-undang dalam memastikan bahawa pengakhiran penghakiman dicapai. Budi bicara pihak pendakwaan di bawah Artikel 145(3) Perlembagaan Persekutuan tidak mutlak. Apabila kes di bawah bidang

kuasa mahkamah, boleh menggunakan semua kuasa undang-undang untuk memastikan pentadbiran undang-undang. Setelah membaca kertas-kertas ketiga-tiga rayuan, mahkamah berpendapat bahawa dalam kepentingan keadilan, soal siasat lanjut perlu dibuat untuk menarik balik rayuan-rayuan. Dengan pendakwaan berbuat sedemikian dan setelah memutuskan bahawa tiada merit-merit untuk meneruskan rayuan di dalam segi fakta-fakta dan undang-undang, perkara tersebut akan didengar tetapi semestinya, dengan kehadiran responden dan peguambela yang terpelajar. Mahkamah sedar bahawa keadilan adalah untuk keseluruhan komuniti termasuklah kanak-kanak yang dikatakan telah diserang secara seksual dan bukan hanya responden (lihat perenggan 38 & 42–44).]

Cases referred to

Ahmad Zahid bin Hamidi v Public Prosecutor [2019] MLJU 1872; [2019] 1 LNS 1987, HC (refd)

Bird Dominic Jude v Public Prosecutor [2014] 3 MLJ 745; [2014] 4 CLJ 133, FC (refd)

Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474; [2021] 8 CLJ 331, FC (refd)

Guyang & Ors v Jabatan Hutan Sarawak [2019] 10 MLJ 684; [2019] 1 CLJ 401, HC (refd)

Liaw Kwai Wah & Anor v Public Prosecutor [1987] 2 MLJ 69; [1987] CLJ Rep 165, SC (refd)

Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443; [2019] 4 CLJ 561, FC (refd)

Saied Safarigharigh lwn Public Prosecutor [2017] 1 CLJ 426, CA (refd)

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199, FC (refd)

Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759; [2021] 5 CLJ 581, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 56A

Criminal Procedure Code ss 153(2), 307, 311, 315, 316, 317, 325, 325(1), (2), 326, Chapter XXXI

Federal Constitution art 145(3)

Government Proceedings Act 1956 s 9(1)

Penal Code s 409

Prevention of Crime Act 1953 s 4, 4(1)

Sexual Offences Against Children Act 2017 ss 14(a), 16

Jean Sharmila Jesudason (Deputy Public Prosecutor, Perak Legal Advisor's Office) for the appellant.

Amir Khusyairi Mohamad Tanusi (Amir Khusyari & Assoc) for the respondent.

Su Tiang Joo JC:

QUERIES

[1] (i) Would the filing of a notice of withdrawal of appeal bring an appeal to an end with immediate effect; (ii) whether the court can exercise its revisionary powers under Chapter XXXI of the Criminal Procedure Code when a notice of withdrawal of appeal has been filed; and (iii) whether an appeal can be heard together with the court exercising its powers of revision.

INTRODUCTION

[2] The respondent faced a total of seven charges under three separate cases in the Ipoh Sessions Court with offences against three children under s 14(a) to be read together with s 16 of the Sexual Offences Against Children Act 2017 (Act 792) ('the Sexual Offences Against Children Act 792').

[3] The three cases were jointly heard. After a trial and at the end of the prosecution's case, on 30 September 2020, the learned trial sessions court judge ('LSJ') held that the prosecution had failed to prove a prima facie case in all three cases and discharged and acquitted the respondent.

[4] Dissatisfied, by three separate notices of appeal, one for each of the three cases and all dated 6 October 2020, the prosecution appealed.

[5] The respondent was and is at all times represented by learned counsel.

[6] Section 14(a) of Act 792 is reproduced below:

> Any person who, for sexual purposes —
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> (a) touches any part of the body of a child;
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> (b) makes a child touch any part of the body of such person or of any other person;
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> (c) makes a child touch any part of the child's own body; or
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> (d) does any other acts that involve physical contact with a child without sexual intercourse, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years and shall also be liable to whipping.
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> Explanation 1 — The act of touching may involve the act of touching with any part of the body or with an object and may be done through anything including anything worn by the person touching or by the child touched.

Explanation 2 — In determining what constitutes sexual purposes, the court may take into consideration, among others, the part of the body that is touched, the nature and extent of the act of touching or the physical contact and all other circumstances surrounding the conduct.

[7] Section 16 of Act 792 provides that:

(1) *If a person* who commits any offence under this Act or any offence specified in the Schedule against a child, *is in a relationship of trust with the child, such person shall, in addition to the punishment to which he is liable for such offence, be punished with imprisonment for a term not exceeding five years and shall also be punished with whipping of not less than two strokes.*

(2) In this section, a person is said to be in a relationship of trust with a child if the child is under his care, supervision or authority, including but not limited to —

(a) a parent, guardian or person who is related through full-blood or half-blood, or through marriage or adoption, including de facto adoption;

(b) a person who looks after one or more children for valuable consideration for any period of time;

(c) a teacher, lecturer or warden of a kindergarten, school, public institution of higher learning or private institution of higher learning;

(d) any person providing healthcare services in a Government healthcare facility or private healthcare facility as defined in section 2 of the Private Healthcare Facilities and Services Act 1998 [Act 586];

(e) a coach; and

(f) a public servant of whatever rank in the course of his duty under any written law in respect of the child.

[8] The respondent is alleged to be in a relationship of trust with the children under the seven charges he faced and if convicted on all the seven charges he could be sentenced to a maximum of 175 years plus whipping of a minimum of fourteen strokes.

FILING OF NOTICES OF WITHDRAWAL OF APPEAL

[9] The three appeals were to be heard on 30 June 2021 and the court had duly read the papers in preparation for the hearing of the appeals.

[10] On 29 June 2021, the prosecution filed a notice of withdrawal of appeal for each of the three appeals.

[11] Having read the papers and despite the notices of withdrawal of appeals, the court was of the preliminary opinion that further inquiry ought to be made into the three cases under appeal. Notice was given to the prosecution

through this court's learned senior assistant registrar to re-look into the matter.

[12] The respondent had through his learned counsel, filed his written submissions on 28 April 2021 to oppose the appeals.

[13] By reason of the Movement Control Order brought about by the COVID-19 pandemic, the hearing date of 30 June 2021 was vacated and re-fixed for 22 July 2021.

[14] On 22 July 2021, both learned deputy public prosecutor ('DPP') and the learned counsel for the respondent together with the respondent attended court. The learned DPP informed the court that she needed a bit more time to finalise her written submissions which she said will be ready to be filed by the afternoon and sought for the appeals to be heard the following day. Learned counsel for the respondent had no objections saying he is ready for the hearing the following day.

[15] It so happened that a trial scheduled for continued hearing on both 22 July 2021 and 23 July 2021 was vacated because representations had been made to the learned Attorney-General. With the respondent in the three appeals before the court being on remand for some other matter and if he were to be sent back to the remand centre, it may take another month at least for the requisite precautionary quarantine period for COVID-19 to lapse before he can be brought back to court for the hearing of these appeals, it was agreed by all parties that the appeals be heard the following day, 23 July 2021.

[16] The written submissions of the learned DPP was filed in the late afternoon of 22 July 2021.

[17] On 23 July 2021, the learned DPP applied for the three notices of withdrawal of appeals to be withdrawn and to be struck off by the court. Learned counsel for the respondent objected to such a withdrawal.

DPP'S CONTENTIONS

[18] The learned DPP submitted that having reappraised the legal case authorities, she is of the considered opinion that there are merits to the appeals contrary to her earlier view. She submitted that based upon her reconsideration of the matter, there are serious errors in both facts and law in the judgment of the LSJ. The inference is that to her mind, appellate interference is warranted.

[19] On the withdrawal of the notices of withdrawals of the appeals, she drew the court's attention to s 325 of the Criminal Procedure Code ('the CPC') which provides as follows:

A (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

B (2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

C

[20] Pursuant to the powers housed within s 325 of the CPC aforesaid, once the record of proceedings are brought to the knowledge of the court, the court may exercise any of the powers conferred by ss 311, 315, 316 and 317 of the CPC. These powers are extensive and they include the following:

D

(i) to order a stay of execution of any judgment, order, conviction or sentence pending appeal, see section 311 CPC;

(ii) pending appeal to direct the accused to be arrested and committed to prison or admit him to bail, see section 315 CPC;

E

(iii) to reverse an order of acquittal or conviction, maintain or enhance the sentence or alter the nature of the sentence, see section 316 CPC; and

(iv) take further evidence or direct it to be taken by the Subordinate Court, see section 317 CPC.

F

[21] It was pointed out by the learned DPP that although under s 326 CPC no party has any right to be heard either personally or by advocate before a judge when exercising his powers of revision, no order shall be made to the prejudice of the accused unless he has an opportunity of being heard, either personally or by advocate, in his own defence, see sub-s 325(2) CPC.

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[22] With the respondent having filed his written submissions and with both the respondent and his learned counsel present, there will be no concern about any order being made to his prejudice in his absence.

H

[23] The learned DPP added that the order being sought in the appeal is not to substitute the order of discharge and acquittal to one of conviction but for an order that a prima facie case had been made out at the end of the prosecution case and for the accused to be sent back to the sessions court to enter his defence to the charges.

I

THE RESPONDENT'S CONTENTIONS

[24] Quite rightly, the respondent submitted that he will not be submitting on the merits of the appeal.

[25] Instead, he asserted that prior to 23 July 2021 he had only heard that the prosecution had filed a notice of withdrawal of appeal and it's only in the morning of 23 July 2021 that he was informed by the court interpreters that such a notice had been filed for each of the three cases. He did not wish to address the court on this during the case management on 22 July 2021 as he had only heard of it ('dengar dengar sahaja').

[26] However, he drew the court's attention to the fact that the notices of appeal had been filed on 8 October 2020 and surely the prosecution would have sufficient time to reconsider the matter and by reason thereto, the revisionary powers under s 325 of the CPC ought not to be invoked.

[27] Learned counsel asserted that there is no provision in the CPC that empowers the court to decide on whether to allow the withdrawal of the notices of appeal and once filed, it cannot be retracted as it prejudices the respondent.

[28] However, learned counsel conceded that there is no timeline for the court to exercise its revisionary powers and that the court can do so even if there is no appeal but he asserted that such (revisionary) powers cannot be used once the prosecution has exercised its rights to appeal under s 307 of the CPC and after the prosecution has filed a notice of withdrawal of appeal. No authority was cited by learned counsel in aid of this proposition.

[29] Indeed, learned counsel candidly conceded that there is no provision in the CPC which provides that an appeal is considered dismissed once a notice of withdrawal is filed.

[30] In closing, learned counsel asserted that for the court to exercise its revisionary powers in the circumstances of this matter it would lead to an adverse perception by the respondent on the administration of justice and ought not to be proceeded with.

COURTS FINDINGS AND RULING

[31] In *Guyang & Ors v Jabatan Hutan Sarawak* [2019] 10 MLJ 684; [2019] 1 CLJ 401, Dr Lim Hock Leng JC (now J) accepted the submission of learned counsel for the appellants that:

> the court can exercise its revisionary powers even though there is an appeal at the

same time, as the purpose and scope of an appeal and the process of revision are different. The appellant/applicant for revision need not abandon one or the other unless the grounds are the same or overlap.

[32] In so holding Dr Lim Hock Leng JC (now J) at paras [13]–[14] of the same case very helpfully made refences to several authorities and said:

> [13] In holding that an application for revision can be dealt with while an appeal is pending or called up at the same time, reference is made to *Mohammad Hassan v PP* [1985] 5 MLJ 65; [1997] 1 CLJ Supp 485; [1997] 1 BLJ 485 where Augustine Paul JC (as he was then) held:
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> > Section 305 of the CPC provides that a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. Once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the court hearing the appeal to act in revision. The court is entitled to and will, where appropriate, act in revision and set aside a conviction (see p 75E–F); *Lee Yu Fah & Ors v Public Prosecutor* [1937] MLJ 179; [1937] 1 LNS 31, *Mohd Dalhar Bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645; [1995] 2 CLJ 209 and *Public Prosecutor v Mohamed Tarmizi* [1985] 1 MLJ 219; [1984] 1 LNS 107 followed.
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> [14] In *Manokaran & Anor v Public Prosecutor* [1978] 1 LNS 118; [1979] 1 MLJ 262, Abdoolcader J held:
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> > I have however not only extensive powers of revision in criminal proceedings under the provisions of s 325 of the Criminal Procedure Code but even wider powers conferred by s 35 of the Courts of Judicature Act 1964, and the deputy public prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. I would merely add that in my view notwithstanding the provisions of s 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity. It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, *but, as I pointed out to counsel on both sides at the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter,* and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors* [1934] 62 IA 36 to the effect that *when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by another provision in the Criminal Procedure Code from doing so in the appeal*. (Emphasis added.)

[33] In *Ahmad Zahid bin Hamidi v Public Prosecutor* [2019] MLJU 1872; [2019] 1 LNS 1987, the High Court had to deal with an application by Ahmad Zahid Hamidi to amalgamate the 12 charges of criminal breach of trust

by a public servant or agent levelled against him under s 409 of the Penal Code into three pursuant to s 153(2) of the CPC. The Public Prosecutor opposed the application, asserting that Ahmad Zahid Hamidi cannot be allowed to succeed in his challenge against the discretionary powers of the Attorney-General as the Public Prosecutor has the absolute discretionary power to decide how to institute criminal proceedings under art 145(3) of the Federal Constitution and also that the court has no jurisdiction to entertain this application. Although, Collin Lawrence Sequerah J did not allow the application, His Lordship, however, held that:

> [58] While the prosecution can properly exercise its powers to institute, conduct or discontinue any proceedings for an offence pursuant to art 145 (3) of the Federal Constitution, *the moment the case is registered with the court,* the court is vested with jurisdiction to entertain such applications to amalgamate charges in an appropriate case.
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> [59] *Therefore, if it thought that the prosecutor was improperly exercising the power under art 145(3) of the Federal Constitution and s 376 (1) CPC, the court can and will interfere to correct such exercise.*
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> [60] However, in the circumstances of this particular case, the court saw no good reason or rationale for so exercising its powers to that end. *The respondent's submission therefore that this court had no jurisdiction to entertain such application as to do so would usurp the powers of the Public Prosecutor are devoid of any merit.* (Emphasis added.)

[34] The aforesaid words said in the context of the court having the power to amalgamate charges once proceedings for offences are registered with the court is premised upon the court having the judicial power to oversee that there is no miscarriage of justice.

[35] Similarly, in these cases before the court, once the notices of appeals are registered with the court all proceedings comes within the jurisdiction of the court and can only be brought to an end with the leave of the court. A notice of withdrawal of appeal would not bring an appeal to an end until and unless the court allows the appeal to be struck off or dismissed.

[36] And, if the High Court can exercise its powers of revision even if there is no appeal filed, surely it can do so if an appeal is filed and a notice of withdrawal filed but before it is struck off by the court.

[37] In the recent case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581, the Federal Court had to deal with a case of preventive detention under s 4 of the Prevention of Crime Act 1953 ('the POCA'). In this case, the applicant alleged that his detention without trial was unconstitutional and applied to be released

by applying for a writ of habeas corpus. The majority of the Federal Court held that s 4(1) of the POCA was not unconstitutional but the making of an order for remand by a Magistrate should not be automatic merely upon a written statement being produced, as there are prerequisites to be fulfilled before the making of the remand and the Magistrate is entitled to review the sufficiency and reasonableness of the police officer's grounds for believing that the appellants' names should be entered on the Register. His Lordship Vernon Ong FCJ held that the magistrate is duty-bound to exercise his discretion *judicially* (Emphasis added) in order to ensure that all the legal, procedural and constitutional safeguards are strictly complied with before making the remand order and that the question of s 4 of the POCA requiring the Magistrate to act on the dictate of the Executive, thereby violating the doctrine of separation of powers, did not arise. After laying down the guidelines to be followed by the magistrate, Vernon FCJ inquired of the Senior Federal Counsel and counsel for the appellants (see para [149] of *Zaidi bin Kanapiah*) whether the guidelines were adhered to.

[38] By analogy, before allowing an appeal to be withdrawn by any party, it behoves the court to exercise its discretion judicially in order to ensure that the ends of justice are met.

[39] Having said the above, the court is conscious that in a later Federal Court case of *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474; [2021] 8 CLJ 331, Zabariah Mohd Yusof FCJ in delivering the majority judgment in another POCA case where the appellant was also applying for a writ of habeas corpus, said at paras [127] and [128] that the guidelines set out by Vernon Ong FCJ in *Zaidi bin Kanapiah* are *per incuriam* as these guidelines cannot override and replace the statutory requirements as mandated by s 4 of POCA. However, here this court is not dealing with a POCA case but one under the Sexual Offences Against Children Act 792 where the CPC, wherein the criminal revisionary powers of the High Court is housed in, would be applicable with full force and the issue of deciding the issues here in contravention of another statutory provision do not arise.

[40] However, it has since been settled in an unanimous decision of our apex court comprising a panel of seven Federal Court judges in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199 that:

> [112] Article 145(3) of the FC provides the AG/PP [Attorney-General/Public Prosecutor] with a wide discretion to institute, conduct or discontinue any proceeding for a criminal offence. This wide discretion means the AG/PP has sole and exclusive discretion in that only he/she can exercise such power. *However, the AG/PP does not have absolute or unfettered discretion under* art 145(3). As alluded to in the preceding discussion and following from it, it is our judgment that in

appropriate, rare and exceptional cases, such discretion is amenable to judicial review. (Emphasis added.)

[41] See also *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443; [2019] 4 CLJ 561 where the Federal Court at para [81] held that the reassertion by the Federal Court of its constitutional judicial power and its status as a superior court meant that the power of the attorney general to grant or refuse consent under s 9(1) of the Government Proceedings Act 1956 (Revised 1988) Act 359 to institute a suit or be joined as a party in any existing suit on behalf of the Government or the public in any matter pertaining to public, religious, social or charitable trusts is amenable to judicial review.

[42] In a nutshell, the perceived absolute discretion of the public prosecutor in art 145(3) of the Federal Constitution is not absolute. The aforementioned Federal Court cases of *Sundra Rajoo Nadarajah* and *Peguam Negara Malaysia* lend support to the point that once a case comes within the purview of the court, the court will be armed with all the judicial powers to oversee the administration of justice.

[43] Having read the papers in these three appeals, I was of the considered opinion that in the interest of justice, further inquiries ought to be made and that the prosecution ought to reconsider whether it ought to withdraw the appeals. With the prosecution having done so and having decided that there are merits to pursue the appeals both on the facts and the law, the matter will be heard but of course, in the presence of the respondent and his learned counsel.

[44] In acting as the court has done in this case, the court is conscious that justice is for all in the entire community including the children alleged to have been sexually assaulted and not only for the respondent. In *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] CLJ Rep 165, the Supreme Court speaking through Abdul Hamid Omar CJ Malaya (as His Lordship then was) held that:

> We would also observe that the object of revisionary powers provided for in the Code is to confer upon criminal Courts a kind of *paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions* or apparent harshness of treatment*, which has resulted on the one hand in some injury to the due maintenance of law and order*, or on the other hand, in some undeserved hardship to individuals. (Emphasis added.)

[45] In *Saied Safarigharigh lwn Public Prosecutor* [2017] 1 CLJ 426, Abdul Rahman Sebli JCA (now FCJ) cited with approval the case of *Bird Dominic Jude v Public Prosecutor* [2014] 3 MLJ 745; [2014] 4 CLJ 133 (FC) which held

A that;

> The law on point is therefore s 56A of the CJA which is designed to confer judicial power upon the court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. It is intended to facilitate a full hearing of the appeal on its merit *so that justice is not only done to the accused but also the public and state*. (Emphasis added.)

B

[46] To facilitate ease of reference, s 56A of the Courts of Judicature Act 1964 (Revised 1972) Act 91 referred to above in the case of *Bird Dominic Jude* is reproduced hereunder:

C

> Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.'

D **[47]** It would be pertinent to add that when the High Court exercises its revisionary powers under Chapter XXXI of the CPC, the Court may issue a warrant directing that the accused be arrested and brought before the Court, and may commit him to prison pending the disposal of the appeal or admit him to bail, see ss 325(1) and 315 of the CPC.

E

CONCLUSION

[48] Wherefore, the court allowed the application of the learned DPP and struck out the three notices of withdrawal of appeal and set the appeals down
F for hearing and revision with the hearing deferred at the request of learned counsel for the respondent to another date to enable him to study the written submissions filed by the learned DPP.

Application allowed; appeals set for hearing and revision.

G

Reported by Addibah Adnan

H

I